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Eighty Law Professors, Including 14 Osgoode Professors, Send Letter to Ontario Premier and the Attorney-General Critical of the Provincial Government's Use of the Notwithstanding Clause

various

September 16, 2018

The Notwithstanding Clause – Only in the Last Resort

Dear Premier Ford and Attorney General Mulroney,

In 1982, Canada became a full-fledged constitutional democracy. Parliamentary supremacy gave way to a democracy guided by the Constitution. All governments, federal and provincial, must act within the precepts of the *Charter of Rights and Freedoms*. The *Charter* guarantees all Canadians their fundamental rights and freedoms, subject only to such reasonable limits "as can be demonstrably justified in a free and democratic society" (section 1).

Section 33 of the *Charter* – the so-called "notwithstanding clause" – allows governments to override some of the rights and freedoms in the *Charter of Rights and Freedoms*. The fundamental freedoms in section 2, the legal rights in section 7 to 14, and the equality rights in section 15 can be overridden by federal, provincial or territorial governments, by including a declaration clause in the legislation. The other rights in the *Charter* – including democratic rights– are not subject to section 33.

The framers of the Constitution included the notwithstanding clause as a compromise to achieve consensus. But, they firmly believed that the notwithstanding clause would only be used in exceptional circumstances. This has indeed been the case since the *Charter*'s enactment in 1982.

The notwithstanding clause has only been effectively invoked by two provinces. From 1982 to 1985, Quebec included a section 33 declaration in its legislation, to signal that its laws were not to be subject to the *Charter*, as a political protest. The Quebec government subsequently invoked section 33 to allow the government to limit the use of English signage. Finally, Saskatchewan has used it to force provincial employees to work and to allow the government to pay for non-Catholics to attend Catholic schools.

In 2000, Alberta tried to invoke the notwithstanding clause in its attempt to maintain the opposite sex definition of marriage, but the legislation was deemed ultra vires – the province did not have jurisdiction to define marriage. In 1982, Yukon also moved to invoke the clause in the *Land Planning and Development Act*. But the Act was never brought into force.

In 36 years, the notwithstanding clause has rarely been used. Liberal governments, NDP governments and Conservative governments at the federal and provincial levels have all been extremely reluctant to use the notwithstanding clause. Faced with judicial decisions declaring legislation unconstitutional, governments in Canada have sought alternative ways of bringing their laws into compliance with the Charter.

This is precisely what the framers of the Constitution had hoped and predicted. The notwithstanding clause was only to be used in the most exceptional circumstances.

Given this history, and the essential role of the *Charter* in reflecting and reinforcing our constitutional democracy in Canada, your decision to invoke of the notwithstanding clause is deeply troubling. The question of the size of Toronto's municipal government is a matter on which there is reasonable political disagreement. While the Superior Court of Ontario has declared the law unconstitutional, Justice Belobaba's ruling on *Bill 5* involves a challenging and novel balancing of *Charter* rights and government objectives. We take no position on *Bill 5*'s political desirability or its constitutionality. Rather, our concern is with the immediate move to invoke the notwithstanding clause; the reasons given to justify it; and the suggestion that you will not hesitate to invoke section 33 in future.

Premier Ford, you have stated that you will not allow the courts to override your political mandate. You have pointed out that you are elected, while the judge who ruled against *Bill 5* was appointed. This is not simply a matter of disagreeing with a court ruling. Rather, you have claimed that a majority government can not only ignore court rulings, but that it is also free to set aside constitutional rights.

Canada's constitutional democracy is premised on a balancing of majority rule and constitutional rights. Both legislatures and courts have a fundamental role to play in maintaining this crucial balance. You are not simply invoking the notwithstanding clause to pass a law – you are challenging the core principles underlying our constitutional democracy. You are questioning – and rejecting – the role of an independent judiciary in upholding the fundamental rights and freedoms of every person in Ontario.

Your government's unprecedented move to invoke the notwithstanding clause goes well beyond the question of the size of Toronto's city council. It is a dangerous precedent that strikes at the heart of our constitutional democracy.

We recognize that it is entirely within your government's power to invoke the notwithstanding clause. But it should never be the first resort – it should be the last. The notwithstanding clause must be the exception – not the rule.

Sincerely,

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le 18 septembre 2018

La clause de dérogation – seulement en dernier recours

Cher premier ministre Ford et chère procureure générale Mulroney,

En 1982, le Canada est devenu une démocratie constitutionnelle à part entière. La suprématie du Parlement a laissé place à une démocratie basée sur la Constitution. Tous les gouvernements, au fédéral et dans les provinces, doivent agir à l'intérieur des paramètres de la *Charte des droits et libertés*. La *Charte* garantit à tous les Canadiens et Canadiennes leurs droits et libertés fondamentaux, assujettis aux seules limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique (article 1).

L'article 33 de la *Charte* – appelé la clause « nonobstant » ou « dérogatoire » – permet aux gouvernements de passer outre certains droits et libertés prévus par la *Charte des droits et libertés*. Les libertés fondamentales de l'article 2, les garanties juridiques des articles 7 à 14, ainsi que le droit à l'égalité de l'article 15 peuvent ainsi être mis de côté par un gouvernement territorial, provincial ou fédéral, et ce, en incluant une déclaration à cet effet dans une clause de la législation. Les autres droits prévus à la *Charte* – liberté de circulation, droits démocratiques, droits linguistiques – ne sont pas soumis à la clause de dérogation.

Les artisans de la Constitution ont inclus la clause de dérogation dans le but d'avoir un consensus; il s'agissait d'un compromis. Cependant, il était clair que cette clause devait être utilisée que dans des circonstances exceptionnelles. Et, de fait, cela a été le cas depuis l'enchâssement de la *Charte* en 1982.

La clause de dérogation n'a été invoquée, en réalité, que par deux provinces. Entre 1982 et 1985, Québec a inclus une déclaration sous l'article 33 dans ses textes législatifs, une posture de protestation politique, signalant que ses lois n'étaient pas soumises à la *Charte*. Le gouvernement du Québec, subséquemment, a invoqué l'article 33 afin de limiter l'affichage en anglais. Enfin, la Saskatchewan l'a utilisée afin de forcer le retour au travail d'employé(e)s de la province et pour permettre au gouvernement de payer les frais des non-Catholiques pour aller à l'école catholique.

En 2000, l'Alberta a essayé d'invoquer la clause de dérogation, dans une tentative de maintenir la définition du mariage entre personnes de sexes opposés; cette loi fut considérée ultra vires, puisque les provinces n'ont pas la compétence pour définir le mariage. En 1982, le Yukon a aussi essayé d'avoir recours à la clause, dans la *Loi sur l'urbanisme et le développement*. Celle-ci n'est toutefois jamais entrée en vigueur.

En 36 ans, la clause de dérogation a été rarement utilisée. Les gouvernements libéraux, les gouvernements néo-démocrates, les gouvernements conservateurs, tous ont été extrêmement réticents à y avoir recours. Si un gouvernement au pays était confronté à une décision judiciaire déclarant sa législation inconstitutionnelle,

il s'afférait à trouver une solution alternative pour que ses lois puissent respecter la *Charte*. Il s'agit là de l'approche que les artisans de la Constitution avaient souhaitée et prédite.

On peut avoir recours à la clause de dérogation, mais seulement dans des circonstances les plus exceptionnelles.

Compte tenu de son histoire, et du rôle essentiel de la *Charte* comme instrument validant et consolidant notre démocratie constitutionnelle au Canada, la menace du premier ministre Ford d'avoir recours à la clause de dérogation est fort troublante. La taille du gouvernement municipal de Toronto, certes, est une question au sujet de laquelle il y a des désaccords politiques. Même si la Cour supérieure de l'Ontario a déclaré la loi inconstitutionnelle, la décision du juge Belobaba relativement à la *Loi 5* est un cas unique et difficile, exigeant un équilibre entre les droits de la Charte et les objectifs du gouvernement. Nous ne prenons pas position sur l'opportunité politique ou la constitutionnalité de la *Loi 5*. Nos préoccupations concernent plutôt la réaction immédiate voulant invoquer la clause de dérogation, les raisons données pour le justifier, et la suggestion que le premier ministre Ford n'hésitera pas à utiliser l'article 33 dans le futur.

Monsieur Ford, vous avez déclaré que vous ne permettrez pas aux tribunaux de frustrer votre mandat politique. Vous soulignez avoir été élu, tandis que le juge ayant statué sur la *Loi 5*, lui, est nommé. Il n'en tient donc pas uniquement d'un désaccord avec l'issue d'un jugement. Vous affirmez plutôt qu'un gouvernement majoritaire peut non seulement ignorer une décision judiciaire, mais qu'il est aussi libre de mettre de côté des droits constitutionnels.

La démocratie constitutionnelle au Canada est fondée sur l'idée d'un équilibre entre la gouvernance majoritaire et les droits constitutionnels. Tant les législatures que les tribunaux ont un rôle fondamental à jouer afin de maintenir ce crucial équilibre. Vous ne faites pas simplement invoquer la clause de dérogation afin de passer votre texte de loi; vous attaquez les principes de base qui sous-tendent notre démocratie constitutionnelle. Vous mettez en doute – en fait, vous rejetez – le rôle du pouvoir judiciaire indépendant, qui protège les droits et libertés fondamentaux.

Monsieur Ford, la proposition sans précédent de votre gouvernement d'invoquer la clause de dérogation va bien au-delà de la question de la taille du conseil municipal de Toronto. Il s'agit d'un précédent dangereux, qui va au cœur de notre démocratie constitutionnelle.

Force est de reconnaître que votre gouvernement a tout le pouvoir nécessaire pour invoquer la clause de dérogation. Mais ça ne devrait pas être la première solution; il s'agit plutôt d'une mesure de dernier ressort. La clause de dérogation doit demeurer l'exception, et non devenir la règle.

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